UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE GLORIA M. NAVARRO
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA,	
Plaintiff,	
vs.	No. 2:16-cr-00100-GMN-CWH
JAN ROUVEN FUECHTENER,	
Defendant.	

TRANSCRIPT OF MOTION HEARING

December 29, 2017

Las Vegas, Nevada

FTR No. 7C/20171229 @ 9:31 a.m.

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LAS VEGAS, NEVADA, DECEMBER 29, 2017, 9:31 A.M.

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P R O C E E D I N G S

COURTROOM ADMINISTRATOR: All rise.

THE COURT: Thank you. You may be seated.

COURTROOM ADMINISTRATOR: This is the time set for the motion hearing regarding document number 194, the motion to withdraw plea, in case number 2:16-cr-100-GMN-CWH, United States of America versus Jan Rouven Fuechtener.

Counsel, please make your appearances for the record.

MS. ROOHANI: Good morning, Your Honor. Ellie Roohani for the United States.

I'm joined at counsel table by Special Agent Mari Panovich.

THE COURT: Good morning, Ms. Roohani and Ms. Panovich.

MS. CONNOLLY: Karen Connolly on behalf of Defendant Jan Rouven Fuechtener.

THE COURT: Good morning, Ms. Connolly. Good morning, Mr. Fuechtener.

All right. Well, this is the time set for the motion filed by Mr. Fuechtener to withdraw his guilty plea

which was entered after the government had called on all of its witnesses, and the last witness was not quite yet finished but had presented sufficient testimony.

We did take a break for the afternoon and then the next morning so that the parties could continue to consider whatever information they needed to consider. They asked the Court for a break, and I did grant that and some additional time afterwards.

But now we have a change of counsel. We have some allegations that have been made regarding prior counsel and counsel that was retained apparently either for both Mr. Fuechtener and his husband or just for his husband but also was providing assistance or not. It's quite not clear.

And there's also information about another attorney, who was Mr. Fuechtener's business attorney but who also was attending, and I recall seeing, and may or may not have been providing the information as well.

So by my count we have Mr. Marchese, who was lead counsel at trial, along with Mr. Ben Durham. Mr. Sanft was on, then off, and back on again. Those were the attorneys of record.

We also had Mr. Ben Nadig, who never made an appearance in the case but apparently was retained and also providing information.

And then we had the attorney whose name escapes me, who was this civil business attorney as well.

So let's go ahead and hear argument from Ms. Connolly. Keeping in mind the Court is aware that the standard of proof is not so high as it would be in this situation because trial has begun but there is not a conviction, and there is not a requirement that the Court be convinced that the defendant's either due process rights under the Fifth Amendment or that there's ineffective assistance of counsel.

So go ahead, Ms. Connolly.

MS. CONNOLLY: Thank you, Your Honor.

As you indicated, under Rule 11 a defendant may withdraw a plea of guilty after the Court accepts the plea but before it imposes sentence if the defendant can show fair and just reason for requesting the withdrawal.

The Ninth Circuit Court of Appeals has indicated the standard for withdrawing a plea is a liberal standard.

The Ninth Circuit has indicated that leave to withdraw plea prior to imposition of sentence should be freely granted if there's a fair and just reason presented for doing so.

The Ninth Circuit has also indicated that a defendant need only present a plausible reason for withdrawal prior to imposition of sentence.

And, again, the standard should be construed liberally in favor of the defendant.

In this particular case there's two main reasons why this Court should permit Mr. Fuechtener to withdraw his plea. The first one is that he was not properly advised by counsel as to his exposure under the guilty plea agreement.

From reading the affidavits being submitted, it's evident that none of those attorneys advised him that he had stipulated, agreed that his sentencing range was 24.3 to 30 years.

What they all indicate in their -- collectively, in their affidavits, is they led him to believe or advised him he was facing five to 30.

None of the attorneys went over the sentencing guidelines with him. It's painfully evident from reviewing those affidavits that they had a fundamental lack of understanding of federal sentencing.

In federal sentencing the Court must consider and the parties must consider the United States Code and the guidelines.

What they did in this case was advise Mr. Fuechtener that under the United States Code the mandatory minimum was five years. So they told him, "You can get five to 30. We're going to argue for -- we're going to argue for five years," even though it was a level

40, stipulated level 40.

And that's what they did tell him in the courthouse.

What's also important is that nobody took the time to meet with him to go over -- to go over the guilty plea for a considerable period of time. And let me digress a little and talk about how the plea went down.

It was in the middle of trial. The defendant's lawyers panicked because for some reason they were surprised at how well the Special Agent Panovich testified, even though, if they had done their due diligence, if they had done their required pretrial preparation, there should have been no surprises.

They had grand jury transcripts. They had discovery. So they should have been quite well aware as to the nature of this agent's testimony.

They indicate, "Well, she testified so well," they were surprised. She's a special agent. She's trained to testify. Again, that should be no surprise to anyone.

They indicate, "Well, when we saw how well she testified, we panicked."

And also this is a trial in front of Your Honor, not a jury. Your Honor would be motivated by the facts, not the passion shown by the agent testifying.

However, that's apparently -- allegedly they

were so shocked at the nature of her testimony or how well she testified that they thought there needed to be a guilty plea.

Never prior to this point in time had the issue of entering a guilty plea or pleading guilty been discussed with my client. He had no discussion whatsoever, which if the testimony of the agent was so compelling, plea negotiation should have taken place a long time previously.

Anyway, they're in the middle of the trial. There's a recess, I believe, after the government was finished with their case in chief, and there was some discussion about dismiss -- doing a plea -- or dismissing the advertising charge, which carried mandatory minimum of 15 years.

There was no plea agreement. And I'm not going to go through it in detail because I set it forth in my reply, the timeline which reflects and which proves that there was really no substantive discussion with my client during the day about the plea agreement.

And as the Court's aware, the government can't even offer a plea agreement unless they go and get it approved by supervisors.

After the lunch break, I believe, when the government put on the record, "Look, we need over the evening, we need to go and talk and see if we can come down

with what kind of plea agreement."

There was a recess that evening. It would have been incumbent upon counsel at that point in time to meet with their client, to meet with Jan and say, "Look, this is what we're anticipating, and this is what your guideline range is going to be, and this is going to be your exposure. Now, we've already heard testimony, and the government has already presented its case in chief, so there's going to be all these specific characteristics or relevant conduct that may apply."

That never took place whatsoever with him.

The plea agreement was proffered by the government at 10:00 the next morning. 10:00 they forwarded the plea agreement to counsel. The plea was entered at 12:12. So two hours from defense counsel getting that plea agreement and Jan Rouven entering his plea.

And the record also reflects -- and Mr. Durham indicated, he was still discussing the plea agreement with the defendant when he walked into the courtroom. So it's evident, from the evidence, from the record and from the affidavits, there was no substantive discussion with him about his exposure.

He was aware there was a level 40. "You're stipulating to a level 40." But he had no idea that was 24.3 to 30 years. He found out that that evening when he

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went to -- back to the holding facility and an inmate brought to his attention, "Jan, you just stipulated to 24.3 to 30 years."

The next morning he called Mr. Marchese and told him he wanted to withdraw his plea. And that is undisputed.

The significance of the stipulated 24 to 30 years and the fact that they did not explain this to him is just incomprehensible.

The government, in footnote 14 of their opposition, indicates that if he argues that the stipulated sentence isn't 24 to 30 years, he'll be violating the plea agreement.

Mr. Pacitti, who is the one lawyer he trusted in this whole case, he told him, "You're facing five to 15. You could get five years."

I provided you with an e-mail that he sent to my office with all frankness where I requested an affidavit, he refused to do that, didn't want to throw his friends under the bus.

So I provided you with the e-mail that I sent to him after our conversation verifying that you told me -- he told the defendant, "You're facing five to 15."

There was no possibility, no possibility whatsoever, impossible for him to get five years.

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There's three counts that he was pleading guilty to. Count 1 was to run consecutive to Count 2 and 3. Count 2 and 3 had the mandatory minimum five years. Base offense level for Count 1 was 22. That's 41 to 51 months.

He agreed, he stipulated that Count 1 is to run consecutive to Count 2 to 3. So, again, impossible. You're stipulating to five years plus a minimum of 41 to 50 month -- -1 months on top of that.

There was no discussion with him about variances or departures.

And I think it's significant that Mr. Sanft, in his affidavit, indicated that "We told him we'll argue for five years, we'll argue mitigating, we'll argue that you came and you had this great career and you had no criminal history."

This is not state court. And it's not five to 30 and we go in and we say some things to the judge and we hope the judge will give the low end. It has to be pursuant to the guidelines. And under the guidelines, the fact that he has no criminal history is not a grounds for a variance.

The sentencing commission has specifically -- in the commentary, has indicated that that is not a grounds for a variance whatsoever.

So Mr. Sanft, based upon what he said in his

affidavit, provided erroneous advice.

Likewise, the fact that he had a great career is not a grounds for a variance. Relevant conduct wasn't discussed at all. And that's huge in this case because the case -- the state had already presented its case in chief.

And as set forth in the presentence investigation report, there was evidence presented that supports some relevant conduct, so that relevant conduct had been proven and was applicable even though the government wasn't specifically going to come and request it.

It is evident, from reviewing the affidavits, that the attorneys didn't even know his exposure under the guidelines. They were looking at the statutes below, "Look, he can -- mandatory minimum of five years. You can get five years."

It wasn't realistic, and it was ineffective for them not to take the time to go meet with him and spend some time in explaining to him the significance of what he was pleading to, just what it was he was pleading to, what it meant, what his exposure was. No discussion.

And they pretty much all admitted there was no discussion of the guidelines with him.

There wasn't any discussion with him about the variance and what the Court -- what the Court's obligation

is in terms of a variance.

The Court can grant variances, however is discouraged from doing so unless there's some factor not adequately taken into consideration by the sentencing commission.

Well, my estimation, there's none of those factors in this case. Because I've researched it. It has to be factors not adequately taken into consideration by the sentencing commission. And if the Court does a variance, the Court has to explain in detail the reasons for a variance and the reasons for the extent of the deviation.

So we're looking at a presentence investigation report that's based upon testimony and evidence that's already presented to the Court with not a 30-year sentence, but a life sentence. Life. Again, never explained to him. He had no idea. He thought he was looking at five years because that's what he was told, "You can get five years."

Not only was it not possible, but it was in no -- no -- it was not realistic whatsoever.

Also, pursuant to the plea agreement, it would be a violation of the plea agreement if he requests for a downward departure or variance for anything other than his criminal history. And criminal history is not a ground for variance because Ninth Circuit has already stated that.

That's fair and it's just to let him withdraw his plea under the circumstances because he was not properly advised. He was not aware of his exposure under the sentencing guidelines. He was misinformed about the basic sentencing range. And under the Ninth Circuit case of *Toothman*, that is a grounds for him to withdraw his plea.

Also in the *United States versus Bonilla* the Court indicated that erroneous or inadequate legal advice is a grounds to withdraw the plea. Defendant is not required to show that he would have not pled guilty but only the proper legal advice of which he was deprived could at least have plausibly motivated a reasonable person in the defendant's position not to have pled guilty.

Now, the whole nexus apparently of the reason why he pled guilty was because a five-year mandatory minimum was gone. He's facing 24 to 30 years. Stipulated sentence.

The other reason why, in the interest of fairness, he should be able to withdraw his plea is because of the shenanigans amongst his lawyers in this case: the bickering between Sanft and Marchese and the debacle with Amber Craig.

Marchese was saying how Nadig bragged about having been paid $100,000 for doing nothing. Nadig saying

Marchese was out of his league and only wants his friends to get paid and is in it for the money.

You have Pacitti, who is a business lawyer, trying to mediate between the lawyers, having no criminal experience whatsoever and giving him advice.

The exhibits I presented -- I would submit, Judge, the exhibits that I presented to my underlying motion are just unwillful, lack of a better term, when a man is facing as much time as he was facing, to have to be dealing with that kind of bickering and back stabbing between his defense counsel.

So Marchese encourages him to fire Sanft. He had Sanft and Nadig. And then he had Marchese. Marchese's concerned that Sanft and Nadig are doing nothing. So he counsels him to fire Sanft and Nadig, who refused to refund the $200,000 that he paid them.

So when that money is requested back by his husband, Sanft shoots out an e-mail and starts backstabbing Marchese. With Nadig and Sanft out of the picture, Marchese hires Durham and then he hires Amber Craig.

Not only did Nadig go behind Marchese's back, now Nadig had already been fired, yet he goes and meets with Mr. Fuechtener, without advising Mr. Marchese he was doing so, and scares the living daylights out of him, tells him that he's going to be convicted. "You will be

convicted with Marchese. If you had hired me and Sanft, you would be acquited. We've won cases, sex cases like these in federal court," which, according to Mr. Marchese, was a complete lie.

It's getting closer and closer to trial. Amber Craig's brought in on the eve of trial because obviously Marchese and Durham feel they're not prepared, they need to bring in a former US prosecutor to help them.

And this Court considers dismissing the entire defense time on the eve of trial at request of the government because of her conflict.

Where were the grownups in this case, is the question I must ask. The way he was treated collectively by those attorneys is shameful.

His confidence was already in tatters. His confidence had been -- of his own defense time had been undermined by each other when Agent Panovich testifies and then his lawyers flip out and say, "We've got to take a deal, we've got to take a deal." I would submit that the second reason under the fundamental fairness standard as to why he should be permitted to withdraw that plea.

Now I want to talk a little bit about also the fact that his plea was not -- and under Rule 11, the standard is less stringent than moving to withdraw the plea because it was not knowing and voluntary.

However, I would submit in this particular case that his plea was not knowing and voluntary.

Voluntariness of the plea depends upon whether counsel's advice was within the range of competence demanded of attorneys in criminal cases. That's *Hill versus Lockhart*.

Attorneys practicing in federal court have to be familiar with the United States Sentencing Guidelines. And they're complicated. We all know they're complicated. It's a special art. And it's evident, again, just from -- my inclination was to request an evidentiary hearing; however, I don't even think it's necessary, given their affidavits, because I think their affidavits show they didn't know how the United States Sentencing Guidelines applied in this particular case. They were focused on the United States Code.

To be knowing and intelligent a plea must be -- an act must be done with sufficient awareness of the relevant circumstances and consequences. That's *Brady*, clearly, in this particular case.

And again, I think it's very compelling that not one of those attorneys, not one of them in their affidavit said, "Yes, we told Jan he was stipulating to a sentence of 24 to 30 years." Because they didn't.

And to a layman, saying you're stipulating to a

level 40 means nothing. It means nothing unless you present your client with the sentencing guidelines, "This is what it means. These are the enhancements that could apply. This is the relevant conduct. This is the specific offense characteristics." And go through them all.

And there's absolutely no reason for the failure to (indiscernible) they had to drive to Pahrump. Clearly they didn't want to drive to Pahrump, but even though they had been in trial for only two days, not months, not weeks, nobody, not one of them, went over and met with him that night.

They didn't even meet with him that morning for a substantial period of time. Once they got the plea, then Mr. Durham started reading it to him.

So they say, "We explained it to him," yet he was still reading it to him when they walked into the courtroom.

The plea must be knowing and intelligent, an act done with sufficient awareness of the consequences.

I'd also submit that not only was the plea not knowing and voluntary, but it was also coerced. And when we're considering coercion, we look at this subjective state of mind, and that's from that *Iaea* case, the Ninth Circuit case.

And the behaviors and actions of the attorneys

in this case were a one-of-a-kind debacle. And they destroyed his psyche and his confidence and essentially overcame the (indiscernible) of any man who would be facing trial. He was facing life with these charges.

And we may well believe he could have fired all these attorneys. In the background, he had Mr. Pacitti coming in. He had hired his friends. He didn't want anybody to be upset at each other.

He's telling him, "Just keep going with these guys, just keep going with these guys."

A guilty plea must be stricken if freewill is overborne by the prosecutor or by the accused's lawyers.

I submit in this particular case that the plea was not knowing and not voluntary and that it was coerced.

But I would submit the -- quite clearly, given the fact that -- given the liberal standard that he has presented plausible reason for withdrawal of his plea and he should be permitted to withdraw his plea. Thank you.

THE COURT: Thank you, Ms. Connolly.

Ms. Roohani?

MS. ROOHANI: Yes, Your Honor.

Your Honor, I want to start by noting that in my response to Ms. Connolly's motion, I specifically pointed out the case of *United States versus Ross* and *United States versus Castello*.

And in those two cases, it makes abundantly clear that the statements that a defendant makes during the plea colloquy carry a presumption of veracity, and the Court can consider those, especially when later statements directly contradict those.

That is an indication to the Court that this is done for some purpose other than an attack on the knowing and voluntary character of the plea or based upon coercion.

So I would submit that Ms. Connolly, in her reply, did not ever respond to that argument. And so she's effectively conceded that the colloquy was sufficient. So I just wanted to start with that because I think it's important to the Court's consideration.

But I'd also like to address a few of the things that Ms. Connolly spoke about. And I'll start what she -- with what she ended with, which was the -- what she called the shenanigans of the attorneys.

Now, Your Honor, I -- when we originally got this motion, we had submitted a motion of our own to waive the attorney-client privilege to specifically talk about what the nature of the conversations between Mr. Fuechtener and his retained attorneys was in relation to the plea agreement.

And the reason that we limited it to that is because it is completely irrelevant what happened well

before trial. All of the things that happened -- and I don't know, and, quite frankly, Your Honor, it doesn't matter what happened between Mr. Marchese and Durham and Sanft and Nading and Amber Craig and Mr. Pacitti and -- whatever happened, Your Honor resolved all of that before trial even started. You disqualified Ms. Craig, based on conflict, and you did not disqualify Mr. Marchese and Mr. Durham.

And then Mr. Sanft came back on the case. So all of this was resolved well before trial began and well before a plea was ever entered. So all of that is completely irrelevant.

In terms of the arguments relating to ineffective assistance and Mr. Marchese, Mr. Durham, and Mr. Sanft not advising Mr. Fuechtener about the sentencing guidelines, it seems that the person who is confused about how federal sentencing works is Ms. Connolly and not Mr. Durham and Sanft. And I'd like to point out why, Your Honor.

First, there's two ways that the Court can essentially move away from the sentencing guidelines. And the guidelines are advisory. They're not mandatory. They're not binding on Your Honor in any way.

The only thing that binds Your Honor is the mandatory minimum and the mandatory -- or the statutory

maximum. And that was made clear by Your Honor and by myself during the plea colloquy.

The guidelines are advisory. Now, a variance is based on the 3553(a) factors. So Your Honor could very well consider the nature and circumstances of this defendant. That would obviously include his criminal history so Mr. Sanft was not incorrect when he said you could consider that.

Mr. Sanft was not incorrect when he said that you could look at his employment history. Again, that is based on a variance. Now, a departure is based upon something that's in that guideline book. A guideline that we can specifically point to.

Now, that's different. Your Honor could consider either one of those, and under the plea agreement his attorneys would be entitled to argue either for a variance or a departure. And they were not limited in that way. So all of the things that his attorneys told him were actually true.

More importantly, he takes issue with the fact that he was given a range of five to 30 years. And he says, "Well, that's not accurate because that doesn't tell us anything about the guidelines." But it does tell us something about the guidelines.

Because if you don't apply the guidelines and

you look at just the statutory maximum sentences, Your Honor could have sentenced him up to 60 years because there's a 20-year cap on each of those counts. You could have run them consecutive, and he could be sentenced to 60 years.

Now, life is 720 months, but with -- putting that aside for a moment, the 30-year cap is based on that 40 adjusted offense level.

So they did tell him about the guidelines. They didn't call it that. But, of course, they don't need to call it that. They don't need to explain legally what the difference between a variance and a departure is. They don't need to legally explain what a 40 means on the sentencing table.

They don't need to explain to him how you move down and then you move across. None of that is relevant. And it's not necessary for them to explain that to provide effective assistance.

In giving that 50 -- that 5-to-30-year range, they did explain to him the sentencing guidelines. And Your Honor can find that based upon their affidavits.

Your Honor obviously heard all the testimony in the case. And in speaking with Mr. Marchese, Durham, and Sanft, the issue was not how compelling Special Agent Panovich testified. The fact was, is that the way that the

government presented its case -- and Mr. Sanft commented on this. He said, "It is very methodical. You gave all the puzzle pieces, but Special Agent Panovich is the one who put it all together. It wasn't what she said or how she said but the fact that the entire case came together when she was testifying."

And as Your Honor will remember, she went through device by device, talked about what it was found and where it was found and the forensic paths of all the files and ultimately caused all of that evidence to point back to the defendant.

Up until that point, I submit, Your Honor, that the government had not proven its case. It was through Special Agent Panovich's testimony that we were able to prove our case.

And so they were rightfully concerned. And quite frankly, Your Honor, as it's set forth in the affidavit, I'm sure you observed it, Mr. Fuechtener's demeanor changed during Special Agent Panovich's testimony.

A person who had been joking the entire time throughout trial all of a sudden became somber. Because he realized where this trial was going.

Ms. Connolly also keeps talking about a stipulated sentence, Your Honor, and that he was agreeing to a stipulated sentence.

I submit, Your Honor, a stipulated sentence is essentially a binding plea. And this was not a binding plea under 11(c)(1)(C), this is a plea under 11(c)(1)(A) and (B), which of course leaves Your Honor very wide latitude and discretion in imposing that sentence.

Now, agreeing to a stipulated guideline range is very different than a stipulated sentence.

The way that Ms. Connolly is making it seem is that the defendant agreed that he would be sentenced between 24 and 30 years. But, of course, there was no such agreement whatsoever.

In fact, that plea agreement was specifically designed with the two counts running concurrent solely that Mr. Fuechtener could ask for a five-year sentence. The government didn't need to agree to that, but that is part of the negotiations.

Now, in terms of Mr. Pacitti, Ms. Connolly points to Mr. Pacitti's e-mail. Of course, she points to the part of the e-mail where she is talking about the 5-to-15-year sentence.

But his e-mail, if you read the last exchange, says that he will not file an affidavit or sign an affidavit because he could not remember what happened, and he was trying to help out the defendant. He didn't say he was trying to help out Mr. Marchese and Mr. Durham and

Mr. Sanft and to protect them in some manner. He said that he was trying to protect the defendant.

And, Your Honor, in terms of the relevant conduct, the relevant conduct portion is written in the plea agreement. You went over it with Mr. Fuechtener. I went over it with Mr. Fuechtener. He specifically said he understood it when I read it. He specifically said he understood it when you read it.

So it's disingenuous for him to now turn around and say that you couldn't consider relevant conduct and he didn't know that.

In terms of *Toothman*, Your Honor, as is set forth in our response, *Toothman* is not particularly instructive in the sense that in that case there was two different potential forms of coercion. And in *Toothman* the Ninth Circuit didn't say that that amounted to coercion. They actually remanded it back to the district court for a hearing.

And so, as we set forth in our brief, Your Honor, there has been no case, and the defendant can't point to a single case in circuit courts across this country or in state courts anywhere, that have found that coercion is sufficient to get out of a plea agreement.

And in-fighting between attorneys that occur months before a trial even begins certainly can't be the

basis to withdraw a guilty plea such that the coercion was so overwhelming.

I wanted to just point out two more things, Your Honor, in terms of one of the things that Ms. Connolly had talked about in her motion was that you might remember that the defendant tried to hedge during his colloquy and there were certain facts in the plea agreement that he was not comfortable, I guess, verbalizing and admitting on the record is probably the best way to put that.

But you asked him pointed questions to admit to the elements of the offense.

And if you go back and you look at the transcript, you'll note that when you asked him questions about the essential elements of the offense, whether he possessed the child pornography, whether he received the child pornography, and whether he distributed the child pornography, he did not falter one bit.

He said "Yes," and he didn't try to hedge in any way.

The only two things -- or three things, that he tried to sort of hedge on was, one, with the number of images. And, Your Honor, that's page 36 of the transcript. I don't know if you have that available.

You asked him:

"Paragraph 5 is about the amount of child

pornography found in the devices and so forth.

Do you agree with the facts in paragraph 5?"

He conferred with his counsel.

And then he said:

"Your Honor, it is correct, but I believe there are many duplicates."

He didn't say, "Those are not my images, they weren't on my computer, I'm not the one who put them there"; he said, "They're duplicates."

Again, that goes to the number of images sentencing enhancement.

Then we talk about paragraph 7, which he said -- at the top of page 37:

"And then paragraph 7 is the one that talks about the Skype user name and sharing the GigaTribe lars45 folder.

Do you agree with the facts in that paragraph?"

The defendant says: "Yes."

He doesn't say, "No, I need to think about it, I'm not sure about this." He admitted to distribution through that paragraph by itself.

You skip paragraphs 8 and 9. Specifically paragraph 8 related to the Grindr chats, which is really what the defendant was having issues on taking responsibility for, and paragraph 9, which talked about him

asking his husband to delete messages that Special Agent Panovich shouldn't have seen.

So when you look back, Your Honor, the defendant doesn't have any issue admitting to the essential elements of the crime. The problem that he has is with certain enhancements which, of course, Your Honor can consider anyway. And you could have accepted his guilty plea even without him accepting those enhancements. Or the facts that would support those enhancements.

He never said that he wasn't guilty. He never said that he was innocent. He never said that he didn't want to plead guilty.

You asked him specifically whether he was pleading guilty because in truth and fact he was guilty, and he said yes. Again, he did not waiver.

You specific -- and, again, Your Honor -- and I'll just note back, and I'm not going to go through the entire response that I filed, but every single claim that the defendant is now making is directly refuted by the plea colloquy.

And any statements that he makes now that are going to refute that you should look upon with great caution, specifically because we got a draft of the presentence report right before the defendant decided to -- that he wanted to withdraw his guilty plea or at least put

that on the record.

And so I would ask that you look upon that with great caution and deny his motion. Thank you, Your Honor.

THE COURT: Just a minute, Ms. Roohani.

So it sounds like there were not any prior similar offers to plead guilty that were made and discussed that would have provided Mr. Fuechtener with more knowledge or understanding about what a plea agreement would look like or what -- how the guidelines work.

MS. ROOHANI: And I can represent to Your Honor there was very early on in this case, probably in May of 2016, Mr. Marchese -- I asked him, I said, "Is your client interested in an offer?"

And he said, "No, he's not interested in an offer. If you would like to give me something, I will take it to him."

But at that point we did not offer him anything.

So there was some early discussions of a plea. However, as Mr. Sanft set forth in his affidavit, it is his normal practice to go through the guidelines, once he's looked at the discovery in the case, which was provided very early on, and Mr. Sanft did go through the guidelines with Mr. Fuechtener very early on.

And, of course, Your Honor, that didn't necessarily change -- the facts of this case didn't change

as it went along such that the guidelines would change. The guidelines have always been what they are in terms of what the evidence would show.

MS. CONNOLLY: Mr. Sanft --

THE COURT: All right. So I'll give you a moment to reply, but I'm still making sure I understand that -- the government's response.

So I would not normally think that two hours to review a plea agreement is insufficient when there has been prior time taken between attorney and client to understand basically how the guidelines work, what the exposure is, things of that nature, which usually are discussed before trial, when there is a trial, and then sometimes the issue is just a couple of points differential because of the characteristic that maybe the defendant doesn't want to be in the plea agreement but the government insists needs to be in the plea agreement, and then at some point they come to an agreement to drop that special characteristic.

So two hours would be more than enough for someone to go over a plea agreement like that, that just isn't -- consists of a minor change and something that has already been explained and understood. So it sounds like this was a -- brand new to Mr. Fuechtener.

I am concerned because in the plea agreement there is a statement that the parties stipulate and agree

to the following calculation of the defendant's offense level, and then it has a base offense level with the enhancements and a total adjusted offense level of 40. That's after the two points are deducted for acceptance of responsibility.

And then the relevant conduct that the probation office included in its calculation, when we look at the presentence report, specifically on page 33, paragraph 109, explains the impact of the plea agreement and how the presentence investigation report calculation is different.

The two things that it includes are the obstruction of justice and the -- let's see, the knowing distribution other than through acts described previously.

So, for example, for the obstruction of justice what they're using is the information that the defendant instructed his husband to delete those e-mails, evidence that Special Agent Panovich might be interested in seeing.

So, of course, the government can agree to not present information regarding that claim, and then the Court would be able to determine that those special characteristic points level would not be added.

But in this case, it was specifically already provided in testimony, and now no cross-examination, so you could say untested testimony, but it was also included in the plea agreement on page 9, paragraph 9 of the plea

agreement.

So he's agreeing that those facts are correct, which would mean it would be difficult for the Court to find that it's not applicable if he's agreeing to those facts.

And you're right, he didn't have to agree to those facts. They weren't necessarily part of the agreement that wouldn't need to be in there, but they were in there, and he did agree to them. And then, likewise, with the other five levels that were added by the probation office, it's information that was already provided in the plea agreement.

So I -- I'm not inclined to find that the attorneys did not understand the sentencing guidelines, but I think the only one who said he even reviewed it with the defendant was Mr. Sanft.

I believe Mr. Marchese and Mr. Durham both said in their affidavit that they -- either they said they didn't or they didn't say that they did. Maybe that's how I'm remembering it. But I think Mr. Sanft was the only one who said he reviewed it with Mr. Fuechtener, but that was early on, not at the time of the plea. So it looks like nobody reviewed it with him at the time of the plea.

It does seem a bit rushed in consideration of those specific circumstances in this case as opposed to a

case where you already have had a plea offer and there's just a matter of trying to fine-tune the details and make minor changes that don't really take so long to explain and understand.

So how -- how am I supposed to feel comfortable that Mr. Fuechtener did, in fact, understand the plea agreement? I know we go through this in the canvass, but I don't go through the facts, and -- any more so than just to ask him whether or not he agrees or disagrees with the facts that are stated in the plea agreement.

And I recall that there was a section about the Grindr, I remember in here, page 6, line 8 -- paragraph 8 on page 6.

But other than that, I'm not -- I'm not -- I'm on the edge. I'm very much on the edge here. And I don't have to be convinced, it just has to be a fair and just reason and a plausible reason. And it certainly is plausible at this point that Mr. Fuechtener understood the information provided in the colloquy, which, you're right, does provide a presumption that the plea is knowing and voluntary. And it's already quite lengthy. These plea colloquies are extremely long.

But they depend on the attorney having already provided the defendant with some information.

MS. ROOHANI: And, Your Honor, I can represent

to you, as an officer of the court, and, of course, this -- at the time that -- if you go back and look at the transcript of what was happening in trial, we couldn't very well tell you what we were doing because we were in the middle of trial and you were the fact finder, and it would be completely inappropriate for us to do that.

Now, I can represent to you as an officer of the court that we had the guidelines prepared -- the government had the guidelines prepared before trial ever even began.

So when the defense came and asked me and Ms. Cartier-Giroux for an offer, we went back to the witness room that's right outside the courtroom, I laid it out for them, I said, "This is what he has to agree to."

We went through it. I had a guideline book with me. We looked at it. We looked at what the numbers would be.

So everybody knew what the numbers would be. Everybody knew what facts would be meeting up with every single thing.

The only reason -- and it's my understanding, because Mr. Sanft and Mr. Marchese and Mr. Durham kept coming back into this courtroom during that break. It was my understanding that they were actually conveying some of this to the defendant at that time.

The only reason that they couldn't sit down and

talk with him about it is because they wanted the written plea agreement. And really the last thing that we needed to hammer out was which counts would run concurrent versus consecutive to each other so we wouldn't run up against any statutory maximum problems. That was the last thing that needed to be hammered out.

And, quite frankly, that's not even the issue at this point anyway.

So in terms of the guidelines, the guidelines had been decided upon within minutes of them asking us for an offer.

And so I do believe that they spoke with their client about it. To the extent that Your Honor wants to hold an evidentiary hearing for that portion of it, I think that you can call them up there and ask them that.

I do believe that they didn't specifically say that, but of course, Your Honor, I didn't know that was the pointed question that I needed to ask them to be able to put it in this affidavit.

I do believe that the affidavit certainly suggests that they talk to him about it; otherwise, it doesn't make sense that they would put the 30-year cap on that.

And in terms of Your Honor -- you'll remember that Mr. Fuechtener had a problem with the Grindr chats;

right? And so talking a little about obstruction of justice enhancement and the distribution for a thing of value, because I know that the PSR came back different than what the plea agreement said, it's the government's intent, based upon his fighting, I guess, if you will with that Grindr chat for us to present evidence and show by a preponderance of the evidence that that enhancement should apply, which is what we would be entitled to do under the plea agreement.

We are not entitled to, under the plea agreement, seek any other enhancement such as obstruction of justice, regardless of what is in the plea agreement in terms of that, and the government would not be presenting any evidence regarding that obstruction of justice enhancement.

THE COURT: But you have a plea agreement, so it's already been provided.

MS. ROOHANI: And I believe that the defendant fully understood that in terms of the relevant conduct.

And of course, Your Honor, this is a little bit strange to begin with, right, because typically people don't come and ask for a plea agreement when you're the majority of the way through trial where Your Honor has heard the majority of the evidence.

But that was a risk that the defendant took.

And the government gave him an out. We said, "If you don't want to enter into this plea agreement, that's fine, let's just continue with trial."

And he said, "No, I want the plea agreement."

And he agreed to enter the plea agreement knowing that Your Honor could consider relevant conduct and certainly things that he would sign under the penalty of perjury in the plea agreement.

Of course, he knew that -- he understands English. He read the plea agreement. He represented to you that he read the plea agreement. He represented to you that he understood everything in that plea agreement. And, of course, he knew that he was admitting to that and that Your Honor could consider it.

And so in that way, it's -- it equally makes sense that if -- and, quite frankly, Your Honor, it doesn't, I guess, matter one way or the other whether you add that obstruction of justice enhancement or not because the guideline range is ultimately going to come back to what it is. Because it caps out at a certain amount anyway. And so that should not ultimately be the hang-up here.

And in terms of them having additional time to talk with him, I do believe -- and, again, you know Mr. Marchese, Mr. Durham, and Mr. Sanft. They are

practitioners in this district. They do federal cases all the time.

Mr. Sanft specifically said that it is his practice to go through the guidelines with the client. Over the course of representation and based upon the representations that they have made to you in this affidavit, I believe that you can conclude that they did actually talk to him about the sentencing guidelines.

And to the extent that you're not comfortable --

THE COURT: Does Mr. Sanft say he actually spoke to Mr. Fuechtener about the guidelines? He just said it's practice. But I think he was on the case, and then he wasn't on the case. And he didn't come back in the case until right before trial; right?

MS. CONNOLLY: If you see his affidavit, what he says is, "I've been practicing in federal court" --

THE RECORDER: Ms. Connolly? Ms. Connolly --

THE COURT: Oh, go ahead and pull the microphone towards you. You're taller than our microphones are.

MS. CONNOLLY: In his plea he says:

> It's my custom to always go over the Federal Sentencing Guidelines...I did review the sentencing guidelines... I cannot recall the specific day, as most of the time -- of my time spent with him revolved around his repetition of

the same investigative leads and defenses he felt was important.

And he was out of the -- he was out of the case for a big block of time. And he came in on the eve of trial.

So he didn't say, "I went over the guidelines specifically in this case," it was more generally, "It was my custom to do that."

THE COURT: So it looks like we don't have --

MS. ROOHANI: Well, Your Honor, if you --

THE COURT: -- any evidence that anyone went over the guidelines with Mr. Fuechtener.

I know you are assuming that they did, when they're coming in and out of the courtroom, when you're in the attorney conference room just outside the doors and then the defense attorneys are coming in and out, but the defense attorneys also say in their affidavits that Mr. Fuechtener's greatest concern was how this was going to appear to his fan base, how the media was going to feel about this or his reputation and the business. I think that seems --

MS. CONNOLLY: And, Judge, I set --

THE COURT: -- consistent with --

MS. CONNOLLY: -- I set out a timeline, and in fact I even provided you the transcript where Ms. Roohani

says, "I think Mr. Marchese and I concur that we do need time until tomorrow to have some discussions to figure out some things."

She got the plea agreement to Marchese at 10:00. He had to come over here by 12:00, and then they're back in front of the Court at 12:00.

And I went through the whole timeline in my motion on -- in my reply, and I pointed out that there was a recess; however, they didn't meet with him during the recess. And I even got the marshal records showing they didn't meet with him during the recess.

And you're correct it was general discussion about, "We're going to (indiscernible) 15 years, you could get five years" and, you know, stuff the Court was (indiscernible).

But quite clearly, with that transcript, they both needed time to talk, according to Ms. Roohani.

MS. ROOHANI: And, Your Honor, maybe if I could clarify.

Special Agent Panovich was there when I spoke with Mr. Sanft. We had a conversation with him over the phone. And after that I asked him to memorialize that and send it to me in affidavit.

In Special Agent Panovich's 302, which memorialized that conversation, it reads: It's standard

operating procedure for Sanft to discuss sentencing guidelines in all federal cases he worked on, to include Fuechtener, which is what is in his affidavit.

But then he said he recalled going over the sentencing guidelines at the beginning of taking the case. He did go over the guidelines with the defendant.

And I believe if you called him to the stand he would testify to that.

MS. CONNOLLY: And I would submit they didn't even have all the discovery at the beginning of the case. He can't possibly go over the guidelines and all applicable enhancements with the volume of the images in this case. He didn't have the information at the beginning of the case to be able to have a cogent, intelligent discussion with him about all applicable guidelines.

MS. ROOHANI: And, Your Honor, and I'll note that the majority of the discovery of this -- you'll remember at the beginning of this case, Mr. Marchese was very insistent that we go to trial in June.

So the bulk of the discovery had been produced at the complaint stage.

So before this case was ever indicted they had the discovery. We also had a detention hearing before Your Honor, a detention appeal before Your Honor. And I made it a point to make sure that Mr. Marchese had every single

piece of paper that I had before that detention hearing.

So it cannot be -- and all of those -- the enhancements, Your Honor, all come from the defendant's computer, including the chats, including all the counts, all the evidence come from the defendant's devices.

We didn't gather this from additional sources, confidential sources of other people. This is all evidence that was in the defendant's computers, which the defense had access to from the very beginning. And we went above and beyond to produce that to them in paper format.

So it's just false to say that they didn't have access to this information.

MS. CONNOLLY: And, Judge, this is electronic evidence, so they had to hire experts and investigators to go through and organize.

This is not a 302 in a drug case where you go over with your client and say, "Okay, this is the level of drugs, this is what you're looking at, let's look at the guideline range."

This is a far more complicated case than your run-of-the-mill drug case, where it's easy to calculate the guidelines. And they never went over it with him.

Marchese was the lead counsel. Sanft was in and out. Marchese never went over it with him. Durham never went over it with him.

MS. ROOHANI: And, Your Honor, I'll just note, before I sit down, this is the last thing I'll ultimately say on this is that --

THE COURT: Just a minute, Ms. Roohani. Are you saying that the defense had all of the evidence at the detention hearing and then there was no additional evidence that was provided before trial?

Because I remember that there was.

MS. ROOHANI: Yes. And I can clarify, Your Honor.

The 302s that were produced in this case, the forensic reports and all of the things that were associated with that, had been produced before the detention hearing.

The things that were -- there were thousands of pages produced after the detention hearing. But it was because the defense had asked us to print out this -- they had gone down to the office, they had looked at these Skype chats that we were specifically referring them to at the office. And they said, "Can you print those out for us?"

That was the chats that ultimately became the additional evidence that came through, and as well as the Dropbox evidence which we never even got to and is not even considered as part of the plea agreement.

That was the additional evidence that came after the detention hearing. The majority of this investigation,

with the exception of the Dropbox stuff, was completed before the detention hearing and gave rise to the ultimate charges in this case.

So -- and again, Your Honor, you'll remember at the detention hearing where I argued, Mr. Marchese argued, Mr. Sanft was sitting directly next to him, and I presented Your Honor with a copy of the forensic report.

So to say that they didn't know the number of images or where the chats were, it was all in the forensic report. Your Honor saw that forensic report. It was entered as evidence at trial.

So they did have access to all of this information, and all of that information created the basis of the ultimate guidelines in this case. So they did have the information to be able to advise them of that.

And Mr. Sanft told Special Agent Panovich and myself, he indicated it in his affidavit that he did advise the defendant of those guidelines.

MS. CONNOLLY: And, Judge, I would indicate in the letter from Mr. Nadig he even points out that he and Mr. Sanft didn't meet with my client very often, it was -- again, it was Marchese, who was the lead counsel, was the one that was meeting with my client on a regular basis.

He was the one that was consistent from start to finish.

THE COURT: So Mr. Sanft's affidavit says that:

I have been practicing in federal court cases for the entire length of my career. It is my habit and custom to always go over the Federal Sentencing Guidelines with my client. Although I did review the sentencing guidelines with Fuechtener, I cannot recall the specific day, as most of the time spent with him revolved around his repetition of the same investigative leads and defenses he thought were important.

It does sound like he's equivocating his review of the guidelines with Mr. Fuechtener.

I'm inclined to either grant the motion or have an evidentiary hearing, but I cannot deny the motion based on the information that's been provided.

MS. ROOHANI: And if that's the case, Your Honor, we would ask that you hold an evidentiary hearing. Because I believe if you hear testimony from Mr. Marchese, Mr. Sanft, and Mr. Durham, that they will tell you that they did go over the sentencing guidelines with Mr. Fuechtener.

MS. CONNOLLY: But they won't tell you they went over the guidelines. If they went over the guidelines, they would have put it in their affidavit. Nobody went over the guidelines or this plea agreement with him.

They could have gone to see him the night before and spent some time, and they chose not to do that for whatever reason.

And that was fatal, I would submit.

THE COURT: So, Ms. Roohani, what -- what specifically do you think that the evidentiary hearing would produce that would be helpful?

MS. ROOHANI: Well, Your Honor, if your concern is whether they went over the sentencing guidelines with him, I will submit to you that I did not ask them that. Had I asked them that, I do believe that the answer to that question would be yes.

And, quite frankly, Mr. Sanft told us, and this is in the 302, that Special Agent Panovich again was taking notes as we're having this conversation with him. He said, "I did go over these guidelines with him."

If that's your concern, I believe that you will receive testimony that they did go over the guidelines with him.

And that would be sufficient. That would be enough to overcome any objections that he had that he didn't understand what the number 40 meant.

MS. CONNOLLY: I think they'd have to have gone over the guidelines in the context of this plea.

THE COURT: Right, the plea agreement.

MS. CONNOLLY: And they couldn't do that.

And as the Court indicated, if they'd had a plea agreement before, what usually happens is we go back and forth and we bicker over two points here or two points here.

There was no plea agreement in this complex nature of a case.

So even if they just generically discussed guidelines, which we all do, with, "Here's the guidelines, here's the criminal history on the top, and here's the specific offense characteristics, and this is how the sentence is calculated," it wasn't discussed specific to this guilty plea. And we know that.

MS. ROOHANI: We don't know that, Your Honor.

MS. CONNOLLY: We know that because he didn't have the guilty plea until 10:00 that morning.

MS. ROOHANI: And if between 10:00 and 12:30, when he entered the plea, if they went over it with him, then that would be sufficient. My --

MS. CONNOLLY: Well, no, they -- the record shows that Mr. -- Mr. Durham was --

THE COURT: Just a minute.

So Mr. Marchese's affidavit says that he informed the defendant that his exposure was five to possibly upwards of 30, that he did not believe that the

judge would sentence him to life.

So it sounds like he did understand that there was a possibility of a minimum of five years. He says that -- where is it here? Let's see. It's document 216-1 on page 2, paragraph 9, Mr. Marchese's affidavit:

> I personally told the defendant that he would serve a minimum of five years and that the government would ask for him to serve a really high sentence, possibly upwards of 30 years. I explained that Judge Navarro would decide the sentence but that I did not personally believe that Judge Navarro would sentence the defendant to life. I personally explained that the defendant would be deported after serving his sentence.

MS. CONNOLLY: It doesn't say anything about --

THE COURT: So that supports the defendant's claim that he believed that there was a five-year minimum that was an option that he was going to be able to obtain.

MS. ROOHANI: That is an option that he would be able to attain if Your Honor varied or departed downward.

MS. CONNOLLY: It was not a realistic option.

MS. ROOHANI: It's irrelevant --

MS. CONNOLLY: It isn't irrelevant --

MS. ROOHANI: -- whether it was realistic or not.

MS. CONNOLLY: -- to say that an attorney mis- -- gives their client unrealistic evidence or unrealistic advice. That's their obligation, to give realistic advice to the defendant.

He doesn't say in his affidavit even that he told him the stipulated sentence is 24 to 30 years. Nowhere in any affidavit does it say that.

THE COURT: There on page -- let's see, document 216-2, which is Mr. Durham's affidavit --

MS. CONNOLLY: Stipulated guideline --

THE COURT: -- paragraph 9, it says:

> I personally explained that the plea agreement dropped the advertising charge which carried a 15-year mandatory minimum sentence. I also explained that the sentence -- sentencing guideline range under the plea agreement was a five-year mandatory minimum with slightly over 30 years on the high-end cap for the government's argument. I explained that we could present mitigating evidence to the Court at the time of sentencing to argue for the lowest possible sentence.

And he says he also explained the difference between executive and current terms. So that's why I'm not spending time on that particular question.

But as to the five-year --

MS. ROOHANI: And, Your Honor, that 30 years can only refer to the guideline range in the plea agreement. Otherwise, 30 years doesn't make any sense. It just doesn't make sense.

Then the answer would had to have been 60 years because Your Honor could run all three of them consecutive. 30 years only works, in any mathematical equation, if you're talking about this plea agreement.

Otherwise, Your Honor, there's a five-year mandatory minimum on the receipt count and a five-year mandatory minimum on the distribution count. The only way he could receive five years is by talking about the plea agreement because they run concurrent. Mathematically speaking, that is the only thing that they could be talking about.

So to the extent that you are not inclined to deny the motion today, I do believe that based upon what they -- and, again, Your Honor, maybe it's my fault because I didn't specifically ask them this question, so they didn't know to put this into the plea agreement -- or into the affidavit, but I do believe that they would testify that they talked to him about the guidelines.

And it's indicated in their affidavits that they did talk to him about the guidelines, based upon the things

that they told you that they told him. They could not be talking about anything else.

MS. CONNOLLY: I can tell you, as an officer of the court, that Mr. Pacitti told me in the courtroom there was no discussion about guidelines. The discussion was, "You can get five years, potentially get five years."

They didn't have the guilty plea agreement. It's a 17-page document. So if Mr. Marchese had it in his hand at 10:00, by assuming he ran right over here, they had to read a 17-page document with him, never mind sit down and explain it to him and go over it with the guidelines.

As the Court indicated, insufficient time, just on its face, that would be a plausible reason to -- or a fair and just reason to let him withdraw the plea, given the exposure in this case. And for them not to have come in and requested additional time I think was ineffective.

THE COURT: All right. Well, I don't think that I could with all the information presented, not just here in the hearing but in all the documents, as well, that I can deny the motion and expect that the circuit court would look at this and be comfortable with that decision.

So to save some time, I think we should just have an evidentiary hearing so that we can at least get the facts a little bit more clear. Because it does appear as if there is a fair and just reason to withdraw the plea at

this time. But the Court's not clear whether that information does, in fact, exist or not.

The -- again, a lot of this information depends on what the attorneys told the defendant. The defendant has provided his own affidavit, which is attached to the reply. And I think I bookmarked that. No, I didn't. I have this here. It's at the end.

MS. ROOHANI: It's document 222, Your Honor.

THE COURT: That's right. It was filed separately.

And he says:

> I was never told by my lawyers that under the sentencing guidelines the recommended sentence was 24 to 30 years. The guidelines were not explained to me. I never knew the guideline table until after I pled guilty and then by a fellow inmate.
>
> I had no idea of the significance of the guidelines when I pled guilty. I knew I was a level 40 but had no idea what that meant in terms of years. Had I known, I would never have pled guilty. I would have taken my chances at trial and the legal process.

So even though the Court does explain in the plea colloquy what the mandatory minimums are, what the

maximum sentence is for each of the counts, and that they can be run concurrent and consecutive, my canvass is limited to the statutory minimums and maximums and how they can run.

I don't break down what the guideline range is, other than what is represented in the plea agreement is certainly something that he has to have reviewed and understood. But I don't explain to him what the plea agreement includes as a guideline range or that there are facts that are included in that plea agreement which would tend to support additional special characteristics being considered even though they are not part of the plea calculation.

So in the two different paragraphs there's, you know, the section on facts and there's the section about the calculation, and the calculation comes down to a 42 minus 2 is 40, doesn't include the levels for the other facts. But the facts are in the plea agreement regarding him deleting or instructing someone to delete e-mails, which would support an obstruction of justice, special characteristics, and the one about him providing -- sharing pornography in consideration of not a monetary gain but the ability to watch someone else have sex with their daughter, that five-level increase. That -- all that specific information is included in the plea agreement.

MS. ROOHANI: And, Your Honor, I -- to be clear, I still don't understand, and perhaps you can explain to me, why it's relevant that there's additional facts in the plea that may potentially give rise to additional enhancements if the government is not seeking those enhancements.

THE COURT: If the government is not seeking those enhancements, then why are those facts included in the plea agreement? And how is the defendant able to argue for a five-year sentence if the information in the plea agreement actually -- the facts in the plea agreement justify a higher guideline range than what's in the plea agreement?

MS. ROOHANI: Well, and Your Honor, if the government -- for example -- and I'm just speaking hypothetically. If we had put that fact in the plea agreement specifically to trick somebody into agreeing to an obstruction of justice enhancement, that would make sense.

But if we put that fact in the plea agreement because it was the evidence that was presented at trial with no intention that it ever -- if it -- essentially if it was accidentally put in the plea agreement, because it's something that the government has felt that it had already proven, then I don't think that that should be held against

defense counsel for not advising him of it or against the government. I don't think that that's -- can be part of the calculus at that point.

MS. CONNOLLY: I think that's huge. That's their job, is to make sure that there's nothing that's going to come in and trip them up.

And, again, if you look at footnote 14 out there, government's response is pretty evident that they're not going to make any objection to this Court considering evidence that was presented.

They specifically say in there:

> In the event that the government will not present -- be presenting additional evidence to support any specific offense characteristics or enhancements not expressly contained in the plea agreement, the government reserves the right to present evidence to support the stipulated offense characteristics should defendant breach.

Right before that they indicate:

> The Court heard virtually all the government's case in chief and it is the government's position that the Court may consider all that evidence as relevant conduct.

So, again, they're speaking out of both sides of their mouth. (Indiscernible) come up here and judge -- and

specifically say you should apply these, but you should because you've heard the evidence.

And as the judge, it is incumbent upon you to consider that. So although they may not be specifically requesting it, it's relevant conduct. That certainly wasn't told to him by his counsel.

MS. ROOHANI: But it was told to him by Your Honor, it was told to him by me, and he agreed that he understood it.

MS. CONNOLLY: He has counsel. He has lawyers to advise him. They didn't tell him obstruction or -- as the government indicated, their entire case in chief was presented.

The Court has to look at everything, not just what the government's telling the Court to follow. That wasn't explained to him.

And, again, it's beyond dispute that he wasn't advised that he was stipulating to a guideline range of 24 to 30 years.

THE COURT: Well -- and that's a good point, because they do all say that it's five years as a minimum. This is a statutory minimum, not a guideline minimum. The minimum under the guidelines that he agreed to was a level 40, which is not a five-year sentence. And their affidavits state that what they --

MS. CONNOLLY: So there again --

THE COURT: -- communicate to him was that it was a five-year minimum. That's a statutory minimum. That's not the guideline minimum range.

So, again, we're back to what I had written down before, which was I'm not sure that they really explained the guidelines to him and his guideline exposure under the plea agreement.

What they're saying is that they explained what the statutory minimum and maximums were. But --

MS. ROOHANI: And, Your Honor, I just -- I want to clarify because I think that this is important going forward, is I don't believe that there's any authority that says that an attorney has to specifically say, "This is the low end of the guideline range, this is the high end of the guideline range that you're stipulating to." I don't think there's any case authority that says that.

Toothman, which is the only thing that the defendant cites, talks about using two different guideline provisions that cause a huge discrepancy, a difference of 10 to 16 months versus 100 and something to 200 months. That would make sense.

And, more importantly, Your Honor, a lot of this -- these numbers are driven by criminal history. And so if they didn't know his criminal history, they couldn't

have said 24 to 30 years or whatever it might be.

So it's also driven by that. So I just want to be clear --

THE COURT: Well, there are cases that cover those situations because those are more common.

So that's not an issue here. He has no criminal history.

MS. ROOHANI: Okay. So I guess that if we're going to have an evidentiary hearing, would it be preferable to Your Honor for us to now go and speak with Mr. Marchese, Durham, and Sanft, asking them specifically about what they told him regarding the guidelines and submit affidavits to Your Honor to streamline this process, or would you prefer to have an evidentiary hearing?

MS. CONNOLLY: Judge, I would maintain -- I would want to bring in Mr. Pacitti regarding what he told him, and also the inmate -- and I haven't revealed his name because I don't want there to be negative repercussions, but he's willing to come in and talk about he said, "This is what level 40 is," and how he reacted when he made him aware, "You just stipulated the guideline range was 24 to 30 years."

MS. ROOHANI: And I would submit, Your Honor, that Mr. Pacitti's advice to him, as a civil attorney, is completely irrelevant, especially --

MS. CONNOLLY: It is completely relevant. He's his lawyer. He should have kept his mouth shut if he didn't know how the guidelines work or he didn't know something about criminal defense. He certainly shouldn't have still sat there and said, "You could get five years, Jan, five to 15."

Again, that's maybe how the state court works where you have a range, it's certainly not how federal court work, and he had no business saying anything to him or giving any recommendations to him.

MS. ROOHANI: And, Your Honor, if I may?

THE COURT: I think we'll go ahead and set an evidentiary hearing.

How long do you need, Ms. Connolly, to prepare?

MS. CONNOLLY: I'd say 30 days.

MS. ROOHANI: Your Honor, I'll be in trial.

MS. CONNOLLY: Whatever's convenient. We're in no rush.

THE COURT: So you'll be in trial, Ms. Roohani, until when, approximately?

MS. ROOHANI: I'm in trial on January 16th; I'm again in trial on February 5th, Your Honor.

MS. CONNOLLY: What was that, I'm sorry? February 5th?

MS. ROOHANI: Yes.

MS. CONNOLLY: I also have a trial that week.

THE COURT: So are you requesting something in March?

MS. CONNOLLY: Yes, please.

COURTROOM ADMINISTRATOR: Your Honor, we do have all day Wednesday, March 7, available.

MS. CONNOLLY: March 7th, did you say?

COURTROOM ADMINISTRATOR: Yes.

We could start at 9:00 that morning.

THE COURT: I'm wondering if we shouldn't do this on a Friday --

MS. CONNOLLY: March 7th works for me.

THE COURT: -- in case we're in trial.

COURTROOM ADMINISTRATOR: We do have March 9th available, Your Honor.

MS. CONNOLLY: What was the other one? I'm sorry?

COURTROOM ADMINISTRATOR: March 9th.

MS. CONNOLLY: 9th?

THE COURT: All right. So how about Friday, March 9th, starting at 9:00?

MS. CONNOLLY: Yes.

MS. ROOHANI: And, Your Honor, may I request that you tell me specifically what the parameters of this hearing are, and if Ms. Connolly will allow me to speak

without being interrupted, I would appreciate it, in terms of Mr. Pacitti and his additional inmate.

It's my understanding based upon the conversation that we've been having today, is that Your Honor was concerned with the advice that Mr. Durham, Mr. Sanft, and Mr. Marchese had given to Mr. Fuechtener as his retained attorneys who were noticed on this case.

Mr. Pacitti in the letter that was attached by Ms. Connolly to her motion said that he is not comfortable --

THE COURT: If you're asking what are the parameters of the hearing, they're the information provided in the motion and the reply and the response that's already been filled with the Court as well as the information provided here at the evidentiary hearing.

So I'm not limiting or excluding any of the information that's already on the record that is part of this motion that would consistently be part of the evidentiary as well.

MS. ROOHANI: Does that include any disagreements between Mr. Nadig, Ms. Craig? Because the motion was significantly --

THE COURT: Inasmuch as they are relevant to the issue, then, yes. If they're not relevant to the issue, then there would be no need to go into those. So --

MS. ROOHANI: And to be clear, Your Honor, the burden is on Ms. Connolly to show that he wasn't given this information. Would that be fair to say?

THE COURT: The burden is on Ms. Connolly to demonstrate that the defendant can show a fair and just reason for requesting the withdrawal.

MS. ROOHANI: Okay. Thank you, Your Honor.

THE COURT: Also there is a matter that I wanted to address because of the situation with the plea agreement being in question and the request to withdraw.

There was a prior hold on the funds that were in the trust. It was $975,300 and there was a request that that -- that those funds not be withheld since they were going to be released to pay the fine, forfeiture, and restitution pursuant to the plea agreement.

But if the plea agreement is going to be withdrawn -- and I'm not saying it is or isn't, but it looks like there's that potential, I wanted to make sure that I was clear what was going on with that -- those funds. Had they already been released, or are they still being withheld?

MS. CONNOLLY: Judge, and we're fine with you holding those until March, until we have this evidentiary hearing.

MS. ROOHANI: They've been deposited with the

court clerk. They're being held with the court.

THE COURT: All right. So they're still being --

MS. CONNOLLY: I can't speak for --

THE COURT: -- held with the Court.

MS. CONNOLLY: -- Mr. Alfter and his counsel. But on behalf of Mr. Fuechtener, we're fine with just leaving them for now.

THE COURT: All right. Okay. So that will be the order, then, that they'll still remain deposited with the court as they are now, and we'll decide after the motion to withdraw is resolved whether we need to address those funds any differently than what has already been ordered.

So we'll see you back here then Friday, March 9th, at 9:00 a.m.

MS. CONNOLLY: Thank you.

MS. ROOHANI: Thank you, Your Honor.

THE COURT: Thank you, counsel.

COURTROOM ADMINISTRATOR: Your Honor, one additional thing.

The sentencing is currently set for February 15th. Do we want to see if the parties are willing to stipulate that, or we can continue it now?

THE COURT: Yes. Let's go ahead and continue

that now until after the evidentiary hearing. What would be the next date?

COURTROOM ADMINISTRATOR: We do have Thursday, March 22nd, at 10:00 a.m.

MS. CONNOLLY: I'm sorry. I wasn't paying attention.

MS. ROOHANI: Your Honor, we had previously stipulated to 45 days after the resolution --

MS. CONNOLLY: Yes.

MS. ROOHANI: -- of the motion.

THE COURT: Okay.

MS. CONNOLLY: Is this the sentencing date you're talking about? I'm sorry.

THE COURT: All right. So the evidentiary hearing is Friday, March 9th.

COURTROOM ADMINISTRATOR: So approximately 45 days, Your Honor, would be Thursday, April 26, 2017, at 9:00 a.m.

MS. ROOHANI: 2018?

COURTROOM ADMINISTRATOR: Yes.

MS. CONNOLLY: That's spring break? Can you do it -- I think that might be spring break. Can you do it (indiscernible).

COURTROOM ADMINISTRATOR: I'm double checking that date, Your Honor.

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Spring break for Clark County this year is actually March 23rd.

MS. CONNOLLY: May 26 is sentencing?

COURTROOM ADMINISTRATOR: April.

MS. CONNOLLY: April 20 --

COURTROOM ADMINISTRATOR: April.

MS. CONNOLLY: At what time?

COURTROOM ADMINISTRATOR: 9:00 a.m.

MS. CONNOLLY: And then the evidentiary hearing starts at 9:00 on the 9th?

COURTROOM ADMINISTRATOR: Correct.

THE COURT: So both are at 9:00 a.m.: Evidentiary hearing is Friday, March 9th, at 9:00 a.m., and then sentencing is continued until Thursday, April 26, at 9:00 a.m.

All right.

COURTROOM ADMINISTRATOR: Off record.

THE COURT: Off record.

(The proceedings concluded at 10:51 a.m.)

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I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Donna Davidson 1/12/18

Donna Davidson, RDR, CRR, CCR #318 Date
Official Reporter